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IN THE

SUPREME COURT OF THE UNITED STATES.

RUTH NAOMI URSETH,
Petitioner,

vs.

SUN LIFE ASSURANCE COMPANY OF CANADA, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit
and

BRIEF IN SUPPORT.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States of America, and to the Associate Justices:

The petitioner, Ruth Naomi Urseth, an individual, respectfully shows to this Honorable Court:

I.

STATEMENT OF MATTER INVOLVED.

This is a suit on a policy of life insurance in the sum of $5,000.00, **issued** by the Sun Life Assurance Company, in the State of Missouri, on **February 20**, 1936, for a term of five years, beginning on February 15, 1936, and expiring on February 15, 1941. The date of issue, **February 20th**, presupposes a payment on February 15th, the policy reciting that the premium in the amount of $15.05 is to be paid on February 15, 1936, and thereafter is to be paid quarterly. The policy contains a provision that it shall not

take effect until the first premium is actually paid during the life and good health of the assured. The policy was delivered to the assured on February 24, 1936. On April 15, 1936, the assured was killed in an automobile accident.

The amended petition is in conventional form.

The company defended on the theory that the assured worked for the company as an agent, and that it was his duty, as agent, to deliver the policy to himself as an assured and to collect the premium. The position of plaintiff below (petitioner here) was that there was an unconditional delivery, and that there was an extension of credit. A so-called memorandum which was alleged by the company to have been placed with the policy in the company mail box of the assured, who was an agent of the company, at the time of the issuance and delivery of the policy shows that it was intended for him as an assured, since it is addressed to Mr. Urseth and refers to "Your policy 1493-954" (R. p. 78). At the time of the transaction in question, policies and routine work in connection with same were taken care of by Miss Hazel Ash (R. p. 61). She testified that it was her habit to place the policies in the boxes of the agents, although in a deposition previously given she could not recall whether she handed the policy to Mr. Urseth or placed it in his box. It was her practice to wrap around the policy a printed set of rules, then place them in the box of the agent for delivery to the assured. Such rules were only intended for the agent (R. p. 64). No receipt was taken from Mr. Urseth showing the policy was to be delivered for the purpose of inspection, or any other purpose other than unconditionally. The conditional receipt which would ordinarily be taken if a conditional delivery was intended was not filled out. Nobody ever asked the assured for the premium (R. p. 63). Miss Ash testified she sent a letter, designated as Defendant's Exhibit 7, and

explained, "That form letter is notifying him that his policy is no longer in effect and recalling the policy for cancellation" (R. p. 88). The record, which was kept on a card, marked "Defendant's Exhibit 6" (R. p. 88), showed that the policy in question was canceled April 22, 1936, seven days after the death of the assured (R. p. 93). The testimony showed that when agents of the company bought policies they were considered as any other assured, and, if there was a conditional delivery, they were required to sign a conditional receipt. Urseth was employed under a written contract of employment, which is set out in part (R. p. 76). He was to receive advances of $25.00 per week, although the manager (R. p. 51) stated that it was optional with the manager whether such advancements were made. Advances of $25.00 each were made to Urseth under dates of February 4th, 12th and 18th. Two of these advances were made subsequent to the time that Urseth was examined by the company's doctor on February 11th. The date of the application was February 15th. The premium was due February 15, 1936, as shown by the card record (R. p. 88). Urseth's contract of employment was canceled March 23rd. The assured would have received a commission of 40 per cent, and the balance due the company would have been $9.00. There was a question raised whether the assured was to pay for the premium out of advances, or his salary as it was designated. The evidence showed that after the death of Urseth there was a conversation between the manager for the company and counsel for the widow. The manager stated the assured was to pay premiums out of advancements, but did not do so (R. p. 96). The company had charge accounts with some of its agents (R. p. 54). It sold policies to some of its agents and charged them to the accounts of such agents.

The manager knew of the impecunious circumstances of Mr. Urseth at the time of his application for insurance,

and yet the policy was issued and delivered. All of the agents of the company had authority to deliver policies and collect premiums (R. p. 58). Urseth did not refuse to have the premiums deducted from the money as it was advanced to him; there was no demand ever made on him to take the premiums out of his advances (R. p. 58). The manager admitted (R. p. 52) that when the policy was issued on the 20th the company knew the premium had not been paid to the company; nevertheless, the policy was delivered to the assured (R. p. 53). It was the practice of the company to offset accounts of the agents against the accounts of the company. Some of the agents had what were called advance accounts, which were accounts under which the agents owed the company money. The manager testified (R. p. 57) that he did not instruct anybody to take a conditional receipt in this particular case. He learned that the policy was delivered to Urseth about the 26th of February, two days after the date of delivery. From that time until the 23rd of March, when he discharged Urseth, he never instructed anybody to take a receipt from Urseth. There had been a letter that had gone out telling Urseth to pay the premium (R. p. 56).

The company claims to have written a letter, dated February 8, 1936, marked "Defendant's Exhibit 4" (R. p. 80), to the wife of the assured, which petitioner claims she never received. The company claims the date of the letter is a mistake. The excuse offered by the company is that the company did not know the address of Mr. Urseth, although the evidence showed she was never separated nor estranged from her husband (R. p. 96). If there was such a letter, dated February 8, 1936, written, and through error misdated, it is to be noted that the reason given in the letter requesting the return of the policy was not that it was conditionally delivered, but that "the quarterly premium has not been paid."

In terminating the employment by a letter dated March 23, 1936, the company used the following phraseology:

> "In terminating said Agreement, we do so without prejudice in respect of any indebtedness due or to become due the Company for loans, advances or otherwise."

When the policy was turned over to petitioner by her husband toward the end of February, 1936, there was nothing wrapped around it (R. p. 96).

At the close of all the evidence the Court took the view that the policy had never gone into effect because the policy contained the provision, "This policy shall not take effect until the first premium shall have been actually paid during the life and good health of the assured," and because the premium was not paid. The Court sustained a motion for a directed verdict for the company (R. p. 99).

A motion for new trial was filed (R. p. 100) and overruled (R. p. 101). The case was duly appealed to the United States Circuit Court of Appeals, which affirmed the judgment below.

In the Court of Appeals the petitioner took the position that the federal courts are bound to follow the Missouri substantive rules of law which govern this case, to wit:

I.

Where a prima facie case is made based on a policy of insurance the question of delivery is an affirmative defense and the weight of evidence to sustain it is a matter for the jury which the Court cannot lawfully usurp.

Lafferty v. K. C. Casualty Co., 287 Mo. 555, 229 S. W. 750;
Gannon v. Gas Co., 145 Mo. 502, 47 S. W. 968.

II.

Where the agent of the insurance company is also an applicant for insurance, a delivery of the policy to the agent is a delivery to the insured.

Gibson v. Ins. Co., 181 Mo. App. 302, l. c. 310, 168 S. W. 818.

III.

To be conclusive, "documentary evidence," although including every form of writing, must be an instrument or record having legal efficacy and a person to be bound must be a party thereto or vouch for, or be estopped to deny its truth.

Shaw v. American Ins. Union, 33 S. W. (2d) 1052 (St. L. Ct. App.).

(The Court of Appeals for the Eighth Circuit in violation of this Missouri substantive rule of law holds [R. p. 116]—"the positive testimony of the defendant's witnesses, however, in connection with the established practice in such cases, and the carbon copy of the memorandum contained in defendant's file, could leave no rational doubt on that point for the jury to settle.")

IV.

Under the Missouri rule the delivery of a policy of life insurance to an insured without the payment of the initial premium constitutes an extension of credit, irrespective of provisions in the policy to the contrary.

National City Bk. v. Mo. State Life Ins. Co., 332 Mo. 182, 57 S. W. (2d) 1066;
Block v. U. S. etc. Co., 316 Mo. 278, l. c. 294, 290 S. W. 429.

V.

Under the Missouri rule the recital in the policy that a premium has been paid cannot be contradicted. Here

the recital that the premium was to be paid on the 15th day of February, the issue of the policy on the 20th day of February and the delivery of the policy on the 24th, constituted an acknowledgment of the receipt of the premium prior to the date of the issuance, which cannot be contradicted.

Dobyns v. Bay State etc., Assn., 144 Mo. 95, 45 S. W. 1107;

Berryman v. Southern Surety Co., 285 Mo. 379, 227 S. W. 96.

THE PRINCIPAL QUESTIONS INVOLVED ARE:

I.

Are the federal courts bound to follow the Missouri rules of substantive law holding:

1. Where a prima facie case is made on an insurance policy, the defense of nonpayment of the premium or the defense of nondelivery of the policy or conditional delivery is a question of fact and the weight of the evidence is for the jury which the Court cannot lawfully usurp.

2. The delivery of a policy to an applicant who is also an agent of the company is a delivery to the assured.

3. Documentary evidence to be conclusive must be an instrument or record having legal efficacy and a person to be bound must be a party thereto or vouch for, or be estopped to deny its truth.

4. The recital in a policy that the premium has been paid or the equivalent thereto cannot be contradicted in a suit on the policy.

5. The unconditional delivery of a policy to the insured without payment of the initial premium is an extension of credit and a waiver of prepayment irrespective of provisions in the policy to the contrary.

REASONS FOR GRANTING THE WRIT.

(a) The decision of the Court of Appeals is in conflict with the case of **Stoner v. New York Life Ins. Co.**, 61 Sup. Ct. 336, reversing the Court of Appeals for the Eighth Circuit in the case because it refused to follow the Kansas City Court of Appeals, which held that there was a jury question as to whether the disability clauses in a policy offered a question of fact. So in the case at bar the Court of Appeals has usurped the function of the jury.

(b) The decision of the Court of Appeals sets a bad precedent of great importance because of the failure of the said Court to follow applicable Missouri decisions holding:

I.

That the burden of proof is on the Insurance Company and the credibility of the witnesses is for the jury, after a prima facie case is made.

The Court cannot usurp the functions of the jury.

II.

The delivery of a policy by a company to an agent who is also the assured is a delivery to the assured.

III.

"Documentary evidence," although including every form of writing, must be an instrument or record having legal efficacy, and a person, to be bound thereby, must be a party thereto or vouch for or be estopped to deny its truth.

IV.

The delivery of the policy to the assured without payment of the initial premium constitutes an extension of credit.

V.

The recital in the policy that the premium was to be paid on the 15th day of February, the subsequent issuance

of the policy on the 20th of February was equivalent to a recital of payment.

VI.

The great importance of the rules of the state courts as applicable to the federal courts is apparent, and the failure of the federal court to follow the state court rules also constitutes a failure to follow the United States Code, Title 28, Para. 723b, providing that the rules in civil actions at law shall neither abridge, enlarge nor modify the substantive rights of any litigant. The burden of proof rule and the state court rules governing prima facie cases are rules of substantive law which the federal courts are bound to follow.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Eighth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case styled Ruth Naomi Urseth v. Sun Life Assurance Company of Canada, No. 11,854, to the end that the cause may be reviewed by this Court and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other relief as to this Court may seem proper.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION.

The opinion of the Court was handed down April 26, 1941, and is not yet reported.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is April 26, 1941 (petition for rehearing overruled May 16, 1941).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code, Section 240 (a), amended February 13, 1925 (Chapter 229, Sec. 1), 43 Stat. 438; Sec. 1217, U. S. Compiled Statute Cum. Supp. 1925 (28 U. S. C. A. 347).

3. The facts showing jurisdiction have heretofore been set out under "Statement of Matter Involved."

4. The judgment of the Court of Appeals failing to follow the rules of substantive law as enunciated by the Missouri courts as claimed herein is set out (R. pp. 109-119).

5. The cases believed to sustain said jurisdiction are as follows:

> Stoner v. N. Y. Life Ins. Co., 61 Sup. Ct. Rep. 336 (squarely in point, holding that where the Kansas City Court of Appeals held there was a jury question as to whether a disability provision of a policy offered a question for a jury under instructions embodying tests was approved by the Kansas City Court of Appeals, it was error for this Court to hold in effect that the evidence would not support the trial judge's finding in

insurer's action for a declaratory judgment that there was a total disability) (C. C. A. 8 reversed);

Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. Rep. 817;

Ruhlin et al. v. N. Y. Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. Rep. 860;

N. Y. Life Ins. Co. v. Jackson, 304 U. S. 263, 58 Sup. Ct. Rep. 871;

Rosenthal v. N. Y. Life Ins. Co., 304 U. S. 263, 58 Sup. Ct. Rep. 874;

Hudson et al. v. Munnier, 304 U. S. 397, 58 Sup. Ct. Rep. 954;

Mutual Benefit Health & Accident Assurance Co. v. Bowman, 58 Sup. Ct. Rep. 1056, 304 U. S. 549 (Sup. Ct. reversed Ct. of App. [C. C. A. 8] without hearing arguments);

Cities Service Oil Co. v. Dunlap, 308 U. S. 208, 60 U. S. Sup. Ct. Rep. 201 (question of burden of proof);

Fidelity Union Trust Co. v. Field, 311 U. S. ..., 61 Sup. Ct. Rep. 179 (Dec. 9, 1940 (holding that intermediate state courts must be followed);

West v. Amer. Tel. & Tel. Co., 311 U. S. ..., 61 Sup. Ct. Rep. 176 (following Fidelity Union Tr. Co.);

Act of June 19, 1934, Para. 1, U. S. C., Title 28, Para. 723b;

Lafferty v. Kansas City Casualty Co., 287 Mo. 555, 229 S. W. 750;

Gannon v. Laclede Gas Light Co., 145 Mo. 502, 47 S. W. 968;

Shaw v. American Ins. Union, 33 S. W. (2d) 1052;

National City Bank v. Mo. State Life Ins. Co., 332 Mo. 182, 57 S. W. (2d) 1066;

Dobyns v. Bay State etc. Ass'n, 144 Mo. 95, 45 S. W. 1107;

Berryman v. Southern Surety Co., 285 Mo. 379, 227 S. W. 96;

Gibson v. Ins. Co., 181 Mo. App. 302.

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition under I, page 1, which in the interest of brevity is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERROR.

1. The Court erred in holding, contrary to the Missouri rule, that a prima facie case can be overturned by the testimony of the insurance company and that a directed verdict can be entered, the Court of Appeals holding that the Supreme Court of Missouri has not definitely settled the question of the presumption arising from the delivery of a policy, of payment of the premium or the extension of credit (R. p. 115). **(Nothing could be more definite than the decisions of the Missouri Courts cited supra under "Jurisdiction.")** See particularly Lafferty v. Ins. Co., supra. Nor is there any confusion in the Missouri decisions, as the Court of Appeals sets out in its opinion (R. p. 115).

2. The Court erred in holding, contrary to the case of Gibson v. Ins. Co., 181 Mo. App. 302, 168 S. W. 818, the only case in Missouri on the point, that the delivery of the policy to the agent was not a delivery to the assured (who was also the agent) (R. p. 116).

3. The Court erred in holding, contrary to Missouri rule, that the plaintiff was bound by the testimony of the defendant insurance company, and in holding that the case should be taken from the jury.

4. The Court erred in failing and refusing to follow the Missouri decisions holding that the recital in the policy of the payment of the premium or the equivalent thereto could not be contradicted.

5. The Court erred in refusing to follow the Missouri rule that a delivery of the policy without the payment of the initial premium constituted an extension of credit.

V.

SUMMARY OF ARGUMENT.

The ruling of the Court of Appeals is directly in violation of the ruling of this Court in **Erie R. R. v. Tompkins,** 304 U. S. 64, 58 Sup. Ct. Rep. 817, and similar cases decided by this Court since the Erie case, holding that the federal courts are bound by the rules of substantive law as laid down by the state court.

The Court of Appeals has refused to follow the state rule holding:

1. That where a prima facie case is made on a policy of insurance, a case cannot be taken away from the jury and the question of delivery and the payment of premium is an issue of fact for the jury.

2. The credibility of witnesses is for the jury.

3. The holding of the Court of Appeals that the carbon copy of the memorandum contained in defendant's file in connection with the established practice of placing memorandums with policies leaves no rational doubt for a jury to settle, violates the rule of law as laid down by the Missouri Court that it is a question of fact to be determined by the jury.

4. The status of an agent of an insurance company, who is also the assured, is that of an assured, and where the policy is delivered to him, is delivered to him as an assured.

5. The recital in the policy that the premium has been paid, or a statement equivalent thereto, cannot be contradicted in a suit on a policy.

ARGUMENT.

1. The ruling of the Court of Appeals is directly in the teeth of the case of **Erie R. R. Co. v. Tompkins**, 304 U. S. 64, 58 Sup. Ct. Rep. 81, and similar cases since decided by that Court. The law is well settled in Missouri that the assured's possession of the policy raises the presumption that it has been delivered and paid for, or that credit has been extended, and where the evidence of the company is otherwise, the question is for the jury.

> Lafferty v. K. C. Casualty Co., 287 Mo. 555, 229 S. W. 750;
> Gannon v. Gas Co., 145 Mo. 502, 47 S. W. 968.

In the Lafferty case, cited supra, the Missouri Supreme Court, contrary to the statement about indefiniteness set out in the opinion of the Court of Appeals, held:

> "however strong and convincing may be the evidence introduced by the defendant to show that the policy had not been delivered or the premium paid before the death of the insured. The fact of nondelivery, where the policy was in the possession of the insured, is an affirmative defense and the weight of evidence to sustain it is a matter for the jury, which the Court cannot lawfully usurp."

2. The credibility of witnesses is for the jury. Under the ruling of the Court of Appeals, the Court and jury were bound to believe the defendant's witnesses. It is obvious that such is not the law. The dead man was not there to testify and tell the facts with reference to whether or not the so-called printed rules were placed with the policy, and even if they had been, Urseth would not have been bound by them. He was given the policy as **an assured** and **not** as an **agent.** This Court recently held in the Stoner case, decided December, 1940, cited supra, that the

federal courts are bound to follow the Kansas City Court of Appeals where they had made a finding on the same issue and wherein they had held that there was a question of fact presented as to whether or not the assured was totally disabled. The Court of Appeals for the Eighth Circuit undertook to say, as a matter of law, that the assured was not disabled on facts substantially the same as those before the Kansas City Court of Appeals. This Court reversed the Court of Appeals for the Eighth Circuit and held that it was bound to follow the ruling of the Kansas City Court of Appeals. An examination of the opinion of the Court of Appeals in the case at bar shows that it has failed to follow the Missouri decisions. It is noteworthy to point out to this Court that the Court of Appeals, in its opinion (R. p. 115), feebly undertakes to distinguish the Lafferty case, which is the leading case holding that the nondelivery of a policy is an affirmative defense, which the jury alone has a right to determine, so that the statement of the Court of Appeals that "a more definite investigation on the part of the Supreme Court of Missouri will perhaps be necessary to settle the question" is out of order and is not justified by the Lafferty case or the other numerous cases which were cited in the Court of Appeals in the motion for rehearing and which have been cited in the application for certiorari here.

3. Therefore the holding of the Court of Appeals that the carbon copy of the so-called memorandum contained in defendant's file removed the issue of fact and took away a jury issue, violates the substantive rule of law as laid down by the Missouri courts and practically all the courts in the country, as laid down in Shaw v. American Ins. Union, 33 S. W. (2d) 1052, that documentary evidence to be conclusive must be an instrument of record having legal efficacy, and before a person is bound thereby he must be a party thereto or be bound thereby or be estopped to deny

its truth. In the case at bar the assured had nothing to do with the so-called carbon memorandum. He therefore could not be bound thereby nor was he estopped.

4. We have only been able to find one decision, and that happens to be the Missouri case of Gibson v. Ins. Company, 181 Mo. App. 302, which holds that where a policy is delivered to an agent of an insurance company, and who also happens to be the assured, that a delivery to him is a delivery to him as an assured and not as an agent. This case is cited in Cooley's Briefs, Vol. 1, page 641, and in holding, as the Court of Appeals does, it is not only violating the Missouri rule, but is establishing a new rule of law. Contrary to the holding of the Court of Appeals, the Kansas City Court of Appeals in the Gibson case (l. c. 310) held:

> "But it is agreed, in substance, that since Sigler was the agent of defendant the delivery of the policy to him was not a delivery to the assured, but to an agent of defendant for delivery to the assured. This attempted distinction is too fine spun to merit serious consideration. Conceding that Sigler was the agent of defendant, he was also an applicant for insurance, and a delivery of the policy to him was a delivery to the assured."

5. The recital in a policy of the payment of the premium cannot be contradicted. In the case at bar the policy recites that the premium is to be paid on February 15th; it also recites that the policy was issued on February 20th. These recitals, together with the delivery of the policy on February 24th, conclusively establish a recital of the payment of the premium which cannot be contradicted or questioned in an action on the policy. Dobyns v. Bay State etc. Assn., 144 Mo. 95, 45 S. W. 1107; Berryman v. Surety Co., 285 Mo. 379, 227 S. W. 96.

CONCLUSION.

It is obvious, therefore, that the Court of Appeals has failed to follow the controlling Missouri decisions and has set up substantive rules of law of its own making which militate against the Missouri rules.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

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